

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.356 of 1983

SMT. MEENA DEVI & ORS

... .. Appellant/s

Versus

SMT.JYOTI DEVI & ORS

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Raj Kishore Prasad Singh, Advocate
Mr. Bal Bhushan Choudhary, Advocate
Mr. Madan Mohan Prasad, Advocate,

For the respondent no.1 : Mr. T.N. Maitin, Sr. Advocate.
Mr. Santosh Kumar Mishra, Advocate
Mr. Raju Giri, Advocate.

For the respondent no.2 : Mr. Surendra Kumar, Advocate.

CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

Date : 30 -03-2018

This First Appeal has been filed by the plaintiff against the judgment dated 15.03.1983 and decree dated 23.03.1983 passed by Sub Judge, Biharsharif, Nalanda in Title Suit No.167 of 1978 whereby and whereunder the suit of the appellant (plaintiff) was decreed in part on contest against all the defendants except the defendant nos.2 and 6. The court below declared the share of the plaintiffs to the extent of 20 paisa in the suit properties except the land mentioned in Lot no.3 of the plaint. The plaintiffs being aggrieved by the judgment with respect to the property of Lot no.3 of the plaint has filed this appeal.

2. The respondent nos.1,7,8 and 11 have filed cross objection against the finding of learned court below with respect to the



properties mentioned in Lot no.1, 2 and 4 of the plaint. These respondents claim the said properties as their exclusive property acquired by their own personal earnings. The other defendants have not filed any appeal or cross appeal against the findings and judgment of the court below. During the pendency of the appeal, the defendant no.1 Ram Khelawan Singh died and in his place, his widow was substituted. Besides him several parties also died and accordingly substitution were made. In the present appeal, the contesting respondents are heirs of original defendant nos.1 and 2.

3. The case of plaintiffs, who are appellants before this Court in brief is that one Dashrath Singh was the common ancestor of plaintiffs and defendants who had five sons, Gajadhar Singh, Mushafir Singh, Harihar Singh, Nemdhari Singh and Gaya Prasad Singh. The plaintiffs are the heirs of Nemdhari Singh. The defendants no.1 to 8 are heirs of Harihar Singh. Other defendants are heirs of other three brothers Gajadhar Singh, Mushafir Singh and Gaya Prasad Singh. The family of plaintiffs and defendants was possessing 200 bighas of Kasta land and houses at village-Mustafapur, Ishahquepur Begumpur and Bargaon as well as Quamrudinganj Biharsharif upon which the family members remained joint upto 1952. Dashrath Singh was well of persons and he was Karta during his life time. He had acquired Kasta land out of joint family fund and he also possessed proprietary rights. The house of Biharsharif was let out on rent in part and in other part, the



plaintiffs and defendants have been coming in use and occupation. In 1952 there was a private partition in the family during which kast, bakast and other acquired properties by joint family at village-Begumpur were partitioned and according to partition all parties came in separate possession. The said Partition was private in which five divisions were made in respect of house properties and kast land of village-Begumpur and other properties of Bargaon Mustafapur, Luthffalichak as well as house of Mohalla-Quamruddinganj Biharsharif were kept joint due to distant properties and common utility. The defendant no.2 as Mokhtar was residing in the house of Quamruddinganj Biharsharif and realising rent from the tenants and used to divide amongst all the co-shares as per their share. The behaviour of defendant nos.1 and 2 changed and they used to grab the income of joint family properties and did not render account and so dispute and differences cropped up in the family. The plaintiffs demanded partition of joint properties which was denied by defendant nos.1 and 2 on 25.08.1978 and so the plaintiffs filed suit for partition claiming 20 paise share in all the joint family properties as described in lot no.1 to 4 of the plaint.

4. The case of defendant nos.1,3 and 4 as pleaded is that the suit as framed is not legally maintainable due to limitation and partial partition. The plaintiffs have no concern with the suit land since twenty years. They have asserted that Dashrath Singh was not well off rather family was under distress before



1952-53. The defendant no.1 was not the Karta after the death of Dashrath Singh rather Gajadhar Singh being eldest son was Karta. Thereafter Brahmdeo Singh, his eldest son remained Karta till partition of 1952. The properties of Bargaon and Quamruddinganj are self acquired properties of defendant no.1 to which the other defendants and plaintiffs had no concern and the same were not partitioned. The Joint properties which were partitioned are mentioned in 'Akhauta'. The income of Bargaon property and house rent of Biharsharif property was never given to any 'pattidar'. The plaintiff no.2 is a litigant person who poisoned the relation of brother between defendant nos.1 and 2. The defendant no.2 has set up the plaintiff to file the suit. The property of Bargaon is self acquired property of defendant no.1 and its income is given to his wife Jyoti Devi to perform rites and rituals. There was dispute between defendant nos.1 and 2 for which a Title Suit No.10 of 1975 was filed. The defendant no.2 and 6 have falsely claimed house at Biharsharif and Kast land of Bargaon as their own property and so the suit is liable to be dismissed.

5. The case of defendant nos.2 and 6 as enumerated in their written statement inter-alia is that there is no unity of title and possession among the parties. The plaintiffs have no possession on suit land since twelve years and as such they have no subsisting title. The defendant no.1 Ram Khelawan was not karta rather Gajadhar was karta. The ancestral and acquired properties were partitioned by metes and bounds as



mentioned in Akhauta dated 15.12.1952 and all the parties signed and put LTI on it. Before partition in 1952, all the co-sharers had their separate properties acquired by their personal fund which were not subjected to partition in 1952 nor in the present. The house of Biharsharif was the self acquired properties of defendant no.2, as he worked as Teacher and thereafter as Head Master from 1939 to 1948 in the school of District Board. He started practice as Mokhtar in October 1948 and thereafter he became retained lawyer of District Board. He had good income from tuition and out of such income, after purchasing land at Biharsharif, he gradually constructed house on a portion of it in the year 1953 and thereafter completed construction of double story and some land remained vacant. They have further stated that a Title Suit No.10 of 1975 was filed in respect of joint land of defendant nos.1 and 2 but it is not correct to say that the properties of Bargaon, Mustafapur and Biharsharif are not partitioned. The garden and trees of Mustafapur were divided but its land measuring 2.58 acres was not included in *Daz bandi*. After cutting of tress, the land was partitioned about ten years after 1st partition of 1952. The defendant no.2 appropriates the income of Biharsharif house property. The properties of Bihar, Bargaon and Mustafapur were not partitioned due to self acquisition and not due to distant property. The defendant no.2 does not reside at Quamurudinganj with consent of anybody. This suit has been filed at the advise of defendant no.1. The plot no.2902 of



village Bargaon is personal property of defendant no.1 which was acquired through settlement by them in which others have no concern and so the suit is fit to be dismissed with cost.

6. The substituted defendant no.1 in her written statement dated 27.01.1983 has given a go by to the claim of self acquisition of Biharsharif house as claimed by her husband defendant no.1 (since dead) and she pleaded that the same is self acquired property of Amir Chand Singh who acquired the same out of savings and income from teaching and being retainer of District Board. She claimed Bargaon property to be the self acquired property of her husband. She adopted the remaining part of written statement of her husband.

7. The other set of written statement filed by defendant nos.18 to 20, 23 27, 28, 32 and 33 is identical to the case of plaintiff and they also want partition of the suit properties. They assert that the suit properties were never partitioned and were kept joint due to various reasons. The properties of Bargaon and Mustafapur being distant properties were cultivated through Bataidar and Chalhedar and property of Mustafapur was garden which was of common utility and due to tress being dried up, some portion of garden was under cultivation also. The house at Quamrudinganj was only house of the joint family of common utility and a portion of it being on rent also generates income for the joint family which the co-sharers used to divide. The defendant nos.1 and 2 filed a collusive suit bearing Title Suit No.10 of 1975 with a view to



grab the suit properties of partition suit in which the plaintiffs having knowledge intervened in the suit. The defendants no.2 and 6 have made false claim in their written statement regarding self acquisition of land at Biharsharif and construction of house thereon. The defendant no.2 had neither sufficient income nor any fund to acquire the land and construct house thereon. Similarly, the claim of defendant no.1 regarding self acquisition is also false. These defendants have thus prayed to decree the suit.

8. During course of hearing, the plaintiffs-appellants examined seven witnesses. Out of them PW-2 Ram Swarath Singh is plaintiff no.2. The other witnesses Pws-3, 4, 5, 6 and 7 have been examined on the point of jointness of plaintiffs and defendants.

9. The plaintiffs adduced documentary evidence in support of their case which are Ext-1- Rent receipt, Ext-2 to 2/a acknowledgment receipt; Ext-3 Notice dated 04.08.1979 given by Ram Swarth Singh to SDO,; Ext-4 Certified copy of plaint of Partition Suit No.10 of 1975, Ext-5 Certified copy of written statement of Title Partition Suit No.10 of 1975, Ext-6 to 6/B Certified copy of Khatiyani, Ext-6C Original Khatiyani, Ext-7 voters (Matdata) card, Ext-8 Voter list of Bihar Assembly Constituency for the year 1979 (28 pages), Ext-9 Certified copy of sale deed dated 06.12.1947 executed by Md. Takki Mohammad and others in favour of Babu Amir Chand Prasad Singh Mokhtar, Ext-10 Certified copy of Ekrarnama deed



dated 04.01.1950 executed by Amrit Singh in favour of Ram Khelawan Singh, Ext-11 Certified copy of Order sheet of Case No.34 of 1958-59 of DCLR, Nalanda, Ext-12 to 12/a certified copy of notices of Case No.34 of 1958-59 Ext-13 Certified copy of application dated 01.08.1958 submitted before DCLR, Ext-14 Certified copy of report of DCLR; Ext-15 Certified copy of a affidavit sworn by Ram Swarth Singh, Ext-16 Certified copy of Vakalatnama filed in case no.34/58-59, Ext-15/a certified copy of affidavit sworn by Brahmdeo Singh, Ext-17 Certified copy of compromise petition filed in case no.34/58-59, Ext-18 Postal receipt, Ext-19 to 19/b Certified copy of Order sheets and Ext-20 Certified copy of petition dated 01.04.1980 filed before ERO (Electoral Registration Officer).

10. As against this the defendant no.1 and 4 have examined three witnesses. The defendant no.4 has been examined as DW-15 and DW-16 and 17 have been examined on the point of possession and acquisition of land of village Bargaon by Ram Khelawan Singh as his self acquisition. The defendants have adduced documentary evidence which are Ext-A to A-2/5 Six Zamindari rent receipts, Ext-B-2 Ekrarnama deed dated 09.12.1949, Ext-C-2 to C- 2/2 three registered sale deeds, Ext-D-2 to D-2/1 Certified copy of order sheet dated 27.11.1978 and 13.02.1978 passed by Executive Magistrate, Biharsharif, Nalanda in case no.88(M) 1978, Ext-E-2 Certified copy of Non FIR No.4 of 1978, Ext-B-2/1 Registered



Ekrarnama dated 04.01.1950 executed by Maha Singh & others
Ext-F-2 Taksimnama dated 07.06.1950 between Maha Singh
Vrs. Ram Khelawan Singh, Ext-B-2/2 Ekrarnama and
compromise dated 04.01.1950 executed by Maha Singh vrs.
Ram Khelawan Singh, Ext-G-2 Certified copy of Order dated
27.09.1957 in Miscellaneous Case No.78 of 1957-58, Ext-H-2
to 2/1 Certified copy of Zamabandi, Ext-I-2 to I-2/2 Certified
copy of Chakbandi Katiyan, Ext-1-2/3 Original Khatiyani and
Ext-C-2/3 to C-2/4 Sale deed dated 10.08.1950 executed by
Ramkelawan Singh in favour of Smt. Sudama Kuwar.

11. The defendants no.2 and 6 have examined fourteen
witnesses in support of their case. Out of them DW-1 Amir
Chand Singh is defendant no.2. The remaining witnesses,
namely, DW-2 Nand Kishore Prasad Singh, DW-3 Ram
Keshwar Prasad, DW-4 Sadre Alam, DW-5 Deoki Nandan
Singh, DW-6 Tapeswar Narain Singh, DW-7 Bal Mukund
Sharma, DW-8 Dhananjay Sharma, DW-9 Ram Lalit Sharma,
DW-10 Jagda Prasad Singh, DW-11 Ram Manorath Prasad,
DW-12 Baldeo Prasad, DW-13 Ramanuj Prasad Singh and
DW-14 Rajnandan Singh have been examined on the point of
self acquisition of lot no.3 property by defendant no.2, and his
possession over the said land. The defendant nos.2 to 6
adduced documentary evidence which are Ext-A, Dajbandi,
Ext-B and B/1 Zamindari receipts in pen of Jamuna Prasad,
Ext-C to C/1 Two sheet challan relating to Execution Case
no.64/1948 and 63/1948, Ext-D to D/1 Certified copy of



application dated 17.03.1980, Ext-D/2 copy of letter dated 09.01.1976 given by Executive Officer to SDO, Ext-E Certified copy of Order of Confirmation Case No.107 of 1954, Ext-D/3 Certified copy of application dated 16.09.1975, Ext-B2 to B/18 Municipal receipts, Ext-B/19 to B/23 Municipal demand notice, Ext-B/24 to B/28 Municipal notice of information and demand, Ext-F Sale deed dated 06.12.1947 executed by Taqi Mohammad in favour of Babu Amirchand Singh, Son of Harihar Singh, Ext-G Application dated 19.06.1948, Ext-H Municipal Building Map, Ext-E/1 Certified copy of judgment of SCC case No.53 of 1972, Ext-F/1 Certified copy of sale deed dated 25.01.1947 Ext F/2 deed dated 07.03.1945, Ext-D/4 Certified copy of application of Rasan Card dated 12.07.1977, Ext-D/5 CC compromise application filed in proceeding under Section 144 Cr.P.C. (compromise filed on 26.12.1975), Ext-I Certificate 384 dated 29.01.1983, Ext-I/1 Certificate 270 dated 13.10.1983, Ext-J Letter 43 dated 18.11.1964, Ext-D/6 Certificate copy of Application before CO Rajgir, Ext-D/7 C.C. of application dated 02.02.1983 filed before Municipality, Ext-D/8 Certified copy of application dated 16.01.1963 filed by Brahmdeo Singh before Certificate Officer in Cr. Nos.213/56-57, Ext-K certified copy of Municipal assessment register, Ext-L certified copy of written statement filed in T.S.No.10 of 1975, Ext-M voter-list of 194 Assembly Constituency of 1975, Ext-O certified copy of Chakbandi khatian, Ext-P Certified copy of Zamabandi, Ext-



I/2 to I/4 Three certificates granted by Headmaster Middle School Maghra, Silao and Nalanda and Ext-Q certified copy of deposition of Brahmadeo Singh in case 869 and 873 of 1975.

12. The supporting defendant no. 27 has examined three witnesses. Out of them DW-1 Birendra Kumar is formal witness and he has proved rent receipt as Ext-A-1, DW-2 Bindeshwari Pd. Singh is defendant no.27 and DW-3 Ram Badan Singh is defendant no.23. They have deposed on jointness of suit property and joint possession of the parties over the land mentioned in schedule of the plaint. DW-1 is formal witness and has proved rent receipt as Ext-A-1.

13. On the basis of pleadings of the parties, following issues were framed.

(i) Is the suit as framed maintainable?

(ii) Have the plaintiffs got any cause of action for the suit?

(iii) Is there unity of title and community of possession in between the plaintiffs and defendants over the land in suit? If so were the plaintiffs entitled to get a decree for partition to the extent of their 20 paise share?

(iv) Is the story of self acquisition of property of Biharsharif by Amirchand Singh and acquisition of property of Bargaon by Ram Khelawan Singh fit to be accepted and the story of partition of the land of Mustafapur fit to be accepted.

(v) To what relief of reliefs, if any, is the plaintiffs entitled?

14. After discussing the oral and documentary evidence, the learned court below decreed the suit holding that the plaintiffs are entitled to get a decree for partition for his 20 paise share in the suit properties except the properties



mentioned in lot no.3 of the plaint as the defendant no.2 has been able to establish that the properties of Biharsharif fully detailed in lot no.3 belong to Amirchand Singh and that property is not liable for partition. The court below while discussing the issue nos.III and IV at para-6 of its judgment has observed as follows:-

“Thus from the evidence of plaintiffs’ witnesses, it transpires that the joint family of plaintiffs and defendants possessed 200 to 300 bighas of land and had sufficient nucleus to purchase properties in suit.”

15. At the end of para-9 of the impugned judgment, the learned court below has given the following findings:-

“Thus the plaintiffs have been able to prove that the joint family had sufficient nucleus to purchase land and has been able to establish that some of the land described as an orchard were left joint at the time of partition in the year 1952.”

16. Thereafter the learned court below came to a view that onus shifts upon the defendant nos.1 and 2 to establish that the land of village Bargaon purchased in the name of Ramkhelawan Singh and land and house of Biharsharif standing in the name of Amirchand Prasad Singh are their self acquired portieres vide para no.9 of the impugned judgment.

17. The trial court in order to consider self acquisition of defendants no.1 and 2 discussed some of the oral and documentary evidence in paragraphs no.10 of the impugned judgment and ultimately at the end of this para held that Amirchand Prasad Singh, the defendant no.2 has been able to establish that the properties of Biharsharif fully detailed in lot



no.3 belongs to Amirchand Prasad Singh and that property is not liable for partition.

18. The finding about self acquisition of defendant no.1 has been given in paragraph no.11 of the judgment under appeal that the defendant no.4 himself did not establish that land acquired from Maha Singh and Amrit Singh were self acquired property and ultimately held that there is unity of title and community of possession between the plaintiffs and defendants. The trial court also held that plaintiffs are entitled to get a decree for partition of their twenty paise share in all the properties except in the property mentioned in lot no.3.

19. The defendant respondent no.1 Jyoti Devi her sons, Rajendra Prasad Singh, Devendra Prasad Singh and Krishnand Prasad Singh who are heirs of original defendant Ram Khelawan Singh filed cross objection under Order 41 Rule 22 of the Civil Procedure Code for setting aside the decree. According to them, the court below has not considered the documents Ext-B-2, B-2/1, F-2 series A/2, and C-2 which are enough to prove that the parties acquired property out of their own income and earning either prior to 1952 or after separation in the year 1952. The court below has erred in holding that the defendants failed to establish that the properties of village Bargaon were self acquired properties of original defendant no.1. The cross objection was dismissed in view of order dated 26.06.2013 but the same was restored as per order dated 05.05.2015 passed in I.A.No.1005 of 2015.



20. The learned counsel for the appellants, respondents including cross objectors were heard at length. In view of submissions of parties, the following points arise for consideration.

(i) Whether the findings given by the learned court below in respect of property mentioned in Lot no.3 of Plaint holding that such property is self acquired property of the defendant no.2 Amirchand Prasad Singh Mokhtar is sustainable and is fit to be affirmed or liable to be reversed and set aside?

(ii) Whether the defendant no.2 has discharged his burden successfully to prove that the property situated at Mohalla Quamruddinganj Biharsharif as described in Lot no.3 of plaint is his self acquired property?

(iii) Whether the findings of the learned court below in respect of properties described in Lot no.1,2 and 4 of the plaint is fit to be upheld?

21. Points no.-(i) and (ii)

i) The trial court has referred and discussed about three judgments of this Court as well as Apex Court vide AIR 1966 Patna 179, AIR 1981 Patna-43 and AIR 1960 SC-335.

22. In the ruling reported in AIR 1966 Patna page-179, I find that both parties had admitted partition. The suit property mentioned in Schedule 'A' of the plaint being house was kept joint. In plaint, it was neither mentioned as to why suit property was kept joint nor the plaintiff led any evidence about it. The suit property was acquired during jointness by one co-sharer but he claimed his self acquisition and prior partition in the family during which Schedule 'A' property was exclusively allotted to him. Thereafter he constructed house thereon. It was



established in trial that partition had already taken place during which the Schedule 'A' property was allotted to defendant and plaintiff failed to prove jointness. Thus, the court below held that suit property was joint family acquisition which was allotted to defendant on partition and in that context it has been held in the judgment that once partition is admitted or proved then onus to prove jointness is on the plaintiffs.

23. But in the case in hand, I find that there is no admission of partition of the suit property as described in Lot no.1, 2, 3 and 4 of the plaint nor there is any admission of fact that suit properties were also partitioned in 1952. The defendant only pleaded that suit properties being their self acquired properties were kept out of partition in 1952 when other joint properties were partitioned by metes and bounds. On the contrary the claim of the plaintiffs is that the suit properties were kept joint due to pahi (Distant in another village) property of common utility. The parties have also admitted about garden in the land of village-Mustafapur and at village-Lutfalichak there was a Kachahri of Zamindari period belonging to their family and at village-Bargaon land Mela was held and at Biharsharif there was only house for all the parties for common use in the town. Thus, the court below placed onus upon the defendants to prove their self acquisition. On the basis of said decision, it cannot be said that the suit properties were also partitioned amongst plaintiffs and defendants because there is no such case of any party and the court also



can not make out a third case. Hence the said decision is not relevant in the present context.

24. The principle in respect of presumption of joint property and onus to prove joint properties has been laid down in paragraph no.6 of the judgment reported in AIR 1981 Patna Page-43. In the said case, one Bhola Sah had three sons Jugal Sah, Gugul Sah and Dhari Sah @ Ramdhari Sah. Chandar Sah was son of Dhari Sah. Bhola Sah had not even a dhur of land. He died in 1936. During his life time on 17.02.1925 a property was acquired in the name of Jugal Sah vide Ext-1. Chandar Sah along with other heirs of Dhari Sah filed suit for partition of said property against the heirs of Jugal Sah claiming 1/3rd share.

25. The heirs of Jugal Sah contested the suit on the ground that Bhola Sah died in 1926. He had not even a dhur of land. The disputed property was purchased by Jugal Sah in the life time of his father Bhola Sah and Bhola Sah had no income or fund to purchase the said property. The trial court dismissed the suit on the ground that Bhola Sah did not possess even a dhur of land till his death except a house and the land over which it stood. But the appellate court upset the finding of trial court on the ground that the properties covered by Ext-1 were sought to be dealt with in the year 1956 by other branches of the erstwhile joint family. This Court set aside the judgment of lower appellate court and restored that of trial court holding that suit shall stand dismissed throughout. Such finding was



given on the ground that plaintiffs failed to discharge their onus to prove that joint family was possessed of sufficient property which could form the nucleus for the acquisition by joint family in the name of Jugal Sah.

26. Thus, I find that the facts of reported case is quite different from the facts of the present case. The family of plaintiffs/appellants and defendants/respondents of this appeal possessed of 200-300 bighas of land as well as Zamindari, which were partitioned in the year 1952. Thus nucleus in the joint family of appellants and respondents is not only proved but admitted. During evidence and in pleading also it has come that joint family had acquired several properties before 1952. Hence, the trial court placed onus on the defendants to prove the self acquisition on the principle of Hindu law which has been also indicated in para no.6 of said judgment. The principles of Hindu Law as mentioned in para no.6 of the reported judgment are reproduced below:-

(i) If a joint family possessed property which was admittedly joint, the presumption would be that the property continues to be joint and the burden lies upon the member who claims it as his separate properties to prove that there was a partition and he got it on such partition.

(ii) The said presumption is peculiarly strong in the case of brothers.

(iii) The dealings and statement of parties determined the status of the family as to whether it was joint or jointness had disrupted.

(iv) There is no presumption that a family because it is joint possesses joint property or any property.

27. The learned counsels for the parties do not dispute the above legal principles, so in this view of the matter the point arises as to whether the suit of the plaintiffs can be dismissed



in respect of Lot no.3 property on the basis of judgment reported in AIR 1981 Pat.43.

28. The learned counsel for the appellants has also relied on AIR 1960 SC 335 in which the principle of Hindu Law is mentioned at paragraph no.5 of the judgment. The court below has applied the said principle in present case and on application of such principle placed onus upon the defendants (respondents) to prove that suit properties are their self acquired property.

29. The presumption of law mentioned in paragraph no.5 of the reported judgment is being reproduced below:-

(a) There is a presumption in Hindu Law that a family is joint.

(b) There is no presumption that any property, whether movable or immovable held by a member of joint Hindu family, is joint family property. The burden lies upon the persons who asserts that a particular property is joint family property to establish that fact.

(c) If it is proved that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance of joint family property.

30. According to the pleadings of the parties, it appears that joint family of the plaintiffs and defendants possessed about 200 bighas of kast land at village-Begampur which consist of ancestral joint properties as well as properties acquired by the joint family out of the fund of joint family. The properties mentioned in Lot no.1, 2, 3 and 4 are the properties acquired by the joint family



out of the fund of joint family. The plaintiff has asserted that the joint family also possessed zamindari, kachahri and bakast land vide paragraphs no.3 to 8 of the plaint.

31. The defendant no.27, 28, 32 and 33 in para-5 of their written statement has also admitted this fact. The defendant nos.1, 3 and 4 as well as defendants no.2 to 6 in their respective written statements did not specifically deny about the aforementioned joint properties existing before the alleged partition of 1952. Thus by virtue of provisions of Order VIII Rule-5 CPC, the pleading of the plaintiffs about large area of Kast land and other properties belonging to joint family stood admitted as well as proved. The plaintiffs filed several documents in support of their case and also examined witnesses from which the case of plaintiffs regarding existence of sufficient nucleus in the joint family is also corroborated. Hence on the above stated principles of Hindu law the suit properties under partition which were admittedly acquired before the alleged partition of the year 1952 shall be presumed to be the joint family property and as such the onus shall shift on the defendants to prove their self acquisition. The trial court has rightly applied this principles of law and examined the evidence of the parties. The learned court below after referring some of the documents arrived at a conclusion regarding self acquisition of Lot no.3 property by the defendant no.2. The property of Lot no.3 is house and land situated in Mohalla Kamruddinganj at Biharsharif which was purchased as per



registered sale deed dated 05.12.1947 (Ext-9) which is admittedly before partition of 1952. The said sale deed stands in the name of defendant no.2 and his profession is mentioned as Zamindari and Kastkari. No where it is mentioned that he was a teacher as stated in his written statement and in his evidence which proves that the claim of defendant no.2 being teacher at the time of acquisition is false. From perusal of Ext-9, it appears that only four Katha land was purchased for Rs.2000/- out of which Rs.250/- was paid before execution of sale deed and Rs.1750/- at the time of admission of execution before Registrar as mentioned in Ext-9. But on payment of consideration amount the statement of defendant no.2 as DW-1 is contradictory and not in corroboration with the recital of Ext-9 which also disproves his claim of self acquisition vide DW-1 para no.25.

32. The defendant no.2 contrary to the recital of Ext-9 has pleaded in his written statement that he was teacher of District Board School and also earned money by tuition. Thus his claim appears doubtful in view of the fact that the defendant no.2 has not brought on record his appointment letter as so called teacher nor he produced any salary certificate from the appointing authority, the District Board. Therefore, the court below has erred in believing the claim of defendant no.2 that he was teacher before purchase of property at Biharsharif. The court below has referred Ext-I, J, M and N series to hold that Amirchand Prasad Singh was teacher since 1938 and had



sufficient income is not sustainable in the facts and circumstances narrated above.

33. The pleading of defendant no.2 is not specific so far as having separate fund and account is concerned. He has not pleaded in his written statement about the total land purchased by him nor he has given details about the name of vendor and the date of purchase. He has failed to state in his written statement that after purchase of four katha land by Ext-9 one katha land was also purchased orally later on. If actually defendant no.2 would have purchased the land at Biharsharif he must have the full details about the name of his vendor, amount of consideration, mode of payment of consideration amount as well as the date of purchase together with the date and time of subsequent purchase. But non mention of all the facts and circumstances in the written statement casts serious doubt on the claim of self acquisition of the defendant no.2

34. On going through the evidence on record, I find that the contesting defendant no.2 Amirchand Prasad (DW-1) at para-4 has stated that the land of Mohalla Kamruddinganj (Biharsharif) was acquired in two phase by his own personal earning and he had constructed house thereon. The first acquisition was made vide registered sale deed in the year 1947 and the subsequent acquisition of one Katha in the year 1952 was oral. This defendant has not disclosed the name of his vendor, or amount of consideration paid at the time of purchase. The defendant no.2 in his evidence has admitted that



at the time of purchase of Biharsharif property (Lot 3) on 05.02.1947, he was not practicing as Mokhtar rather he started his practice in 1948. In the written stateemnt at para-8, he has stated that he started his practice as Mokhtar in October, 1948. He has further stated in the written statement that he became teacher in 1939 and later Headmaster till 1948 but in evidence he has stated that he became teacher in District Board in 1941. These contradiction in the written statement and his evidence creates doubt on his case of acquisition of Biharsharif property by his own earning. The defendant no.2 (DW-1) in his evidence has admitted that he had no account in the bank. He has not filed any document regarding alleged salary of Rs.30/- per month. There is no document in proof of his self acquisition by the savings of his own income by which the land was purchased at Biharsharif. There is no document of purchasing building material out of own income by which the house of Biharsharif was constructed. He admits that at the time of purchase of Biharsharif land, there was no partition by metes and bounds in the joint family. He has not filed any paper to prove partition by metes and bounds. In the background of such evidence, the story of self acquisition is not established. The income of Rs.30/- per month as asserted by defendant cannot be accepted in absence of specific pleading and documentary evidence of unimpeachable character. Thus, at no stretch of imagination it can be believed that the defendant no.2 would have purchased land at



Biharsharif in 1947 out of the alleged income of Rs.30/- per month which is not pleaded in the written statement and consequently story of self acquisition becomes unproved and uncorroborated by oral as well as documentary evidence.

35. On the point of payment of consideration money with respect to the said deed, the defendant no.2 (DW-1) at para-25 of his evidence, has stated that he had paid Rs.2,000/- at the time of purchase and later on Rs.450/-. On perusal of recitals of sale deed (Ext-9), I find that the total amount of consideration as mentioned in the sale deed Ext-9 is Rs.2,000/- which was paid in two parts firstly Rs.250/- before execution and secondly Rs.1750/- before Registrar. But defendant no.2 claimed to have paid Rs.2,000/- Ist and Rs.450/- later on which is directly contradictory to the contents of Ext-9. Hence, the claim of payment of purchase money by defendant no.2 to the vendor of Ext-9 is stood falsified and under such circumstances the claim of self acquisition by defendant no.2 can not be accepted and relied upon. The defendant no.1 and defendant no.2 are full brothers but both contradicted each other so far as self acquisition of land of Biharsharif is concerned vide para no.8 of written statement of defendant no.2 and 6 and para no.4 of the written statement of defendant nos.1,3 and 4. Such contradictory claim of defendants interse leads to only one and one irresistible conclusion that both defendants have pleaded false claim of self acquisition in respect of a landed property acquired during jointness by the joint family having sufficient



joint property forming nucleus generating sufficient income. But this aspect of the matter has not been considered by the trial court. It appears that the trial court has committed error in observing the fact that the original sale deed in respect of land of Biharsharif Ext-I which came from the custody of defendant no.2 was a circumstance to show that the house of Biharsharif was not purchased from joint property. There is no such proposition of law. The custody of title deed is material only in a case of farzi or Benami transaction. But in the present case, the custody of title deed is not the evidence of self acquisition nor it is material evidence to prove self acquisition especially when the plaintiffs have clearly pleaded in para-8 of the plaint that defendant no.2 has been practicing as Mokhtar and residing in the house of Mohalla Qumrudinganj and he has been realizing rent and dividing the amount of rent amongst all the co-sharers.

36. The evidence on record shows that he was caretaker of land and house of Biharsharif and he looked after all its affairs in municipality and another offices. In the above, the most important fact to establish self acquisition would be the payment of consideration amount to the vendors of Ext-9 (Ext-I). But the learned court below completely overlooked this vital aspect of the matter and pleading and evidence of both the parties on payment of consideration amount. As soon as the plaintiffs have discharged their initial onus that joint family of plaintiffs and defendants possessed raiyati, Bakast and



purchased land about 200 bighas in several villages and Qurmudiganj Bihar Sharif upon which the joint family continued in possession up to December 1952 (as pleaded in paragraphs no.3 to 5 of plaint), the automatic presumption under the law would be that all acquired properties including land and house of Bihar Sharif sought to be partitioned are the joint family property and onus shifted on the defendants to prove self acquisition.

37. In order to prove self acquisition, the defendants are required to plead and prove, specifically their specific and separate income, saving from income and the particular amount of consideration money for purchase was paid by them. But neither defendant no.1 nor defendant no.2 has specifically pleaded the said facts and payment of any particular amount of consideration by them. Thus failure on the part of the defendants to prove payment of the consideration amount falsified their claim of self acquisition meaning thereby they failed to discharge their onus to prove self acquisition. Ext-17 is a most important document which is a compromise petition dated 15.09.1958 signed by the plaintiffs and defendants which was filed on 22.09.1958 in connection with Case No.34 of 1958-59 concerning payment of compensation before the Court of DCLR which is admitted document. In this document, it has been specifically mentioned in para no.6 that the petitioner out of their own will left pahi properties undivided which are still undivided. Thus it becomes admission on the part of defendant



nos.1 and 2 who are also signatories on this petition that properties situated out side the residential village were kept joint on 15.12.1952 on the date when five branches partitioned their ancestral and acquired properties. The related documents are Ext-11, 12, 13, 14, 15, 15/a and 16 concerning the same case in which Ramswarth Singh plaintiff also filed Vakalatnama and affidavit. Such statement made in Ext-17 is binding on defendants no.1 and 2. They cannot plead or assert any contrary fact and so it is not acceptable. The necessary inference which can be drawn out of Ext-17 is that the claim of plaintiffs regarding keeping Pahi property joint is proved. On perusal of Ext-17, I find that the learned court below committed error of record in observing in his judgment in para no.8 that in the recital of Ext-17, it is mentioned that the house of Biharsharif is never joint. There is no such statement in Ext-17. Though the learned court below in para no.8 of his judgment has made a reference of certified copy filed on behalf of defendant no.2 but no such certified copy has been tendered in evidence by defendant no.2 nor admitted in evidence as Ext in the case. Thus, the trial court has committed grave error in not considering the admitted document Ext-17. The documentary evidence filed on behalf of defendant no.2 and 6 relating to the house property of Biharsharif are not relevant and decisive to hold that the defendant no.2 has acquired land of Biharsharif in 1947 especially when he was admitted care taker of Biharsharif house and residing in the same and



practicing as Mokhtar and looking after the entire affairs of the same. All such documents are of much later period than the year of purchase 1947. I further find that the defendants no.2 and 6 have examined total 14 witnesses. But none of them belong to village-Begampur nor any of them is related or connected with the family of plaintiffs and defendants. So on the issue of self acquisition of defendant no.2, none of those witnesses appear competent to depose nor their evidence are sufficient and reliable to hold self acquisition of defendant no.2. Out of total 14 witnesses DW-9 Ram Lalit Sharma, DW-12 Baldeo Prasad are formal witnesses. DW-2 Nand Kishore Prasad Singh, DW-11 Ram Naresh Prasad, DW-13 Ramanuj Prasad Singh and DW-14 Rajnandan Singh are witnesses on tuition. They are not competent to say about self acquisition. Moreover claim of defendant no.2 that he was earning handsome amount by doing tuition stood falsified because defendant no.2 himself has failed to depose on the factum of tuition as discussed above. Thus, no reliance can be placed on the evidence of DW-2, DW-11, DW-13 and DW-14.

38. Considering all the facts, circumstances, documentary and oral evidence coupled with legal preposition, it is evident that the trial court has erred in upholding the self acquisition of defendant no.2. The defendant no.2 has failed to discharge his burden successfully to prove that Lot No.3 property of Biharsharif is his self acquired property out of his own earning and fund.



Point No.(iii)

39. Both the set of defendants have asserted in their written statement about properties of Bargaon and Biharsharif as their self acquisition. Later on the son of defendant no.1 Devenandan Prasad Singh supported the case of defendant no.2 and given a go bye to his claim in respect of property of Biharsharif in his deposition as DW-15. Similarly the defendant no.2 also resiled from his claim of self acquisition regarding property of Bargaon. It appears that they belong to one camp and they earlier had filed T.S.No.10 of 1975 to deprive the plaintiffs and other supporting defendants from joint property of Lot No.1,2 and 4 of the plaint. Defendant no.1 in his written statement did not whisper a word about properties of Mustafapur and Lutfalichak. Thus, he has admitted these properties as joint properties. The defendant no.2 in his written statement at para no.9 and 10 has stated about the said properties by simply denying that it is not correct that these properties were not partitioned which suggests that the properties being joint were partitioned. But Akhauta does not contain these properties and only orchard was partitioned and 2.58 acres land of orchard at Mustafapur was not partitioned.

40. The defendant no.2 at para-10 of his written statement has admitted joint property and partition of tree only. For partition of land, he has asserted about partition after 10 years of 1952 partition i.e. 2nd partition in 1962. But none of the



defendants has proved partition of 1962 by any documentary or oral evidence. The supporting defendant nos.18 to 20, 27, 28, 32 and 33 in their written statement have stated that after division of trees, some trees were left and land was being cultivated which was of common use and utility. The plaintiffs have asserted in plaint that Pahi lands were being cultivated on Batai basis. In the Akhauta of 1952 (Ext-A) the orchard has been cited as 'Barki Bag'. The Ext-6/C is a certificate of transfer prepared under Section 15 of the Consolidation of Holdings Act in joint names of all the parties representing five branches which is an evidence of jointness. Nobody has claimed this property as self acquired property. The land measuring 2A 48 ½ decimal of Bargaon has been claimed by defendant no.1 Ram Khelawan Singh as his self acquisition. But he failed to prove any separate income or fund for acquiring the same. The trial court has not accepted the version of self acquisition. Ext-10 is Ekrarnama between Ram Khelawan Singh and owners of property of Bhargaon to contest case and in lieu of which both parties agreed that they would have half and half share. From the submission of learned counsel for the appellants, it appears that these lands were not purchased by any sale deed. After Ekrarnama, the case was contested by defendant no.1 while he was karta of the family prior to partition of 1952 and invested money in such family litigation out of the fund of joint family and after that both parties to said agreement partitioned half and half. In this



way, joint family came in possession prior to 1952 itself but this land being Pahi was not included in partition of 1952 rather kept joint. It was also not under direct cultivation of the joint family being Pahi land rather the cultivation was being done through Bataidar and Mela was also being held.

41. From the evidence on record as well as submission of appellants, I find that the land of Lutfullichak under Lot no.4, there was Kachahry during Zamindari. After vesting, the State of Bihar did not take possession and the joint family of the parties retained possession as usual and hence it became raiyati land. During Chakbandi operation, it was recorded in the joint names of all the parties and Khatian (Ext-6/B) was prepared which proves jointness on this property. The trial court has discussed about the said properties in para no.11 of the judgment and placing reliance on the evidence of DW-15 Devendra Prasad Singh, the defendant no.4 (who is son of defendant no.1) arrived at a conclusion that self acquisition of defendant no.1 so far as property of Bargaon is concerned, is not established. The court below has considered the evidence of parties and other witnesses and arrived at a conclusion that there is admission of the parties that the properties of villages Begampur, Mustafapur and Bargaon were joint family properties.

42. Considering the evidence on record as well as pleading of the parties, I find that the finding of trial court in



respect of properties mentioned in Lot nos.1,2 and 4 does not require any interference and is accordingly upheld.

43. The cross objection filed by the respondents who are heirs of the defendant no.1 is barred by limitation also as it has been filed beyond the statutory period of one month from the date of service of Appeal Notice on them. Moreover the respondents have failed to support the cross objection during hearing.

44. Resultantly, this appeal is allowed. The judgment and decree with respect to property of Lot no.3 of the plaint is set aside and the appellants/plaintiffs are held entitled to 20 paise share also in the property mentioned in Lot 3 of the plaint. The cross objection filed by respondent nos.1,7, 8 and 17 is accordingly dismissed.

45. In the facts and circumstances of the case, there is no order as to costs.

Brajesh Kr/-

(Sanjay Kumar, J)

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